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May 29, 2015

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor (filing room)
Harrisburg, PA 17120

Re: Implementation of the Alternative Energy Portfolio Standards Act of 2004; Docket No. L-2014-2404361; **COMMENTS OF THE PENNSYLVANIA STATE UNIVERSITY'S**

Dear Secretary Chiavetta:

Please find enclosed for filing with the Pennsylvania Public Utility Commission The Pennsylvania State University's Comments in the above-referenced proceeding.

Should you have any questions or comments, please feel free to contact me directly.

Very truly yours,

Thomas J. Sniscak

Thomas J. Sniscak
Christopher M. Arfaa

Counsel for
The Pennsylvania State University

TJS/CMA/das
Enclosures
cc: Kriss Brown, Assistant Counsel, Law Bureau (kribrown@pa.gov)
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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Implementation of the Alternative Energy Portfolio Standards Act of 2004	Docket No. L-2014-2404361

COMMENTS OF THE PENNSYLVANIA STATE UNIVERSITY ON REVISIONS TO IMPLEMENTING REGULATIONS

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DATED: MAY 29, 2015

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The Pennsylvania State University (Penn State or the University), by its undersigned counsel, Hawke McKeon & Sniscak LLP, submits these comments on the revisions proposed by the Pennsylvania Public Utility Commission (Commission or PUC) in the Advanced Notice of Final Rulemaking Order published in the Pennsylvania Bulletin on May 9, 2015[1] (2015 Order or 2015 ANFR Order) to the Commission's regulations implementing the Alternative Energy Portfolio Standards Act, as amended (the Act).[1] Penn State applauds the Commission's continuing efforts in implementing this important aspect of Pennsylvania energy policy, and appreciates the opportunity to comment on those efforts.

I. INTRODUCTION

The purpose of the Act is apparent from its title: "An Act to provide for the sale of electric energy generated from renewable and environmentally beneficial sources, for the acquisition of electric energy generated from renewable and environmentally beneficial sources by electric distribution and supply companies."[2] Thus, as the Commission has correctly observed, "[t]he ***fundamental intent*** of the Act is the ***expansion and increased use*** of alternative energy systems and energy efficiency practices."[3] Moreover, as the Commission observed in response to the 2007 amendments to the Act,[4] the Legislature's "clear intent" is to provide

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[1] *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, Docket No. L-2014-2404361, Advance Notice of Final Rulemaking Order, 45 Pa. Bulletin 2242 (May 9, 2015) ("*2015 ANFR Order*"). Comments on the proposed revisions are to be filed within 20 days of publication of the ANFR Order in the Pennsylvania Bulletin, *id.*, that is, by May 29, 2015.

[2] Alternative Energy Portfolio Standards Act, 2004 Pa. Legis. Serv. Act 2004-213 (S.B. 1030) (Purdon's).

[3] *Final Rulemaking Re Net Metering for Customer-generators pursuant to Section 5 of the Alternative Energy Portfolio Standards Act, 73 P.S. § 1648.5*, Docket No. L-00050174, Final Rulemaking Order at 21 (entered June 23, 2006) (emphasis added).

[4] Act 35 of 2007, 2007 Pa. Legis. Serv. Act 2007-35 (H.B. 1203), § 1 (Purdon's).

customer generators with "annual compensation for excess generation in a manner that ***encourages research, development and deployment*** of alternative energy systems."[5] The Commission's regulations implementing the Act and its various amendments, codified at 52 Pa. Code §§ 75.1, *et seq.*, have generally been consistent with these fundamental purposes.

On February 20, 2014, the Commission issued a Notice of Proposed Rulemaking (2014 NPRM Order) proposing a number of new requirements and restrictions pertaining to customer-generators and net metering.[6] Comments on the 2014 NPRM Order were filed by Penn State, the Independent Regulatory Review Commission (IRRC), and many other interested parties. As Penn State explained in its Comments, several of the new requirements and restrictions proposed by the 2014 NPRM Order conflicted with the Act and, if adopted, would have frustrated its purposes; several of the revised rules impermissibly contravened express provisions of the Act; and the 2014 NPRM Order failed to establish that adoption of the proposed requirements and restrictions would serve the public interest.[7]

On April 23, 2015, the Commission issued the 2015 ANFR Order, which revises some of the new requirements and restrictions proposed by the 2014 NPRM Order. The revisions address some of the concerns raised by Penn State, but ignore others. Several provisions thus continue to deviate from the express language of the Act and, if adopted, would thwart achievement of its fundamental purpose.

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[5] *Implementation of Act 35 of 2007; Net Metering and Interconnection,* Docket No. L-00050174, Final Omitted Rulemaking Order at 18 (entered July 2, 2008) (emphasis added).

[6] *See Implementation of the Alternative Energy Portfolio Standards Act of 2004*, 2014 NPRM Order, Docket No. L-2014-2404361 (Order entered February 20, 2014).

[7] Comments of The Pennsylvania State University, *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, Docket No. L-2014-2404361 (filed Sept. 3, 2014) (Penn State 2014 NPRM Comments).

II. COMMENTS

A. The Rules As Proposed Contravene The Act And Do Not Serve The Public Interest.

The purpose of the Act is "to provide for the sale of electric energy generated from renewable and environmentally beneficial sources, for the acquisition of electric energy generated from renewable and environmentally beneficial sources by electric distribution and supply companies."[8] Its "fundamental intent . . . is the expansion and increased use of alternative energy systems and energy efficiency practices"[9] by providing customer generators with "annual compensation for excess generation in a manner that encourages research, development and deployment of alternative energy systems."[10] The proposed rules, however, will sharply ***reduce*** customer generators' access to such compensation in several important ways and thus will ***discourage*** research, development and deployment of alternative energy systems in the manner intended by the General Assembly.

Section 1648.5 of the Act commands that "[e]xcess generation from net-metered customer-generators ***shall*** receive full retail value for all energy produced on an annual basis."[11] This provision is clear and may not under Pennsylvania's Rules of Statutory Construction[12] be disregarded, limited or interpreted differently by an agency or court who believes the spirit of

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[8] Alternative Energy Portfolio Standards Act, 2004 Pa. Legis. Serv. Act 2004-213 (S.B. 1030) (Purdon's) (emphasis added).

[9] *Final Rulemaking Re Net Metering for Customer-generators pursuant to Section 5 of the Alternative Energy Portfolio Standards Act, 73 P.S. § 1648.5*, Docket No. L-00050174, Final Rulemaking Order at 21 (entered June 23, 2006) (emphasis added).

[10] *Implementation of Act 35 of 2007; Net Metering and Interconnection,* Docket No. L-00050174, Final Omitted Rulemaking Order at 18 (entered July 2, 2008) (emphasis added).

[11] 73 P.S. § 1648.5 (emphasis added).

[12] 1 Pa. C.S. §§ 1921-1936.

the law differs from its express language.[13] The proposed rules would restrict the availability of compensation to net-metered customer-generators in a manner that not only thwarts the General Assembly's fundamental intent to encourage the research, development, and deployment of renewable energy systems, but also directly contravenes the express provisions of the Act.

1. § 75.1: The definition of "Utility" requires further clarification.

The 2014 NPRM Order proposed to define "utility" in § 75.1 as: "A person or entity that provides electric generation, transmission, or distribution services."[14] It also proposed a new § 75.13(a)(2), which disqualified customer-generators from net metering where the alternative energy system is owned or operated by a "utility."[15] As Penn State, the IRRC and other commentators maintained, these revisions, if adopted, would have precluded prospective customer-generators from partnering with third-party owner-operators to deploy alternative energy systems to serve the customer-generators' load. This, in turn, would have sharply curtailed the ability of prospective customer-generators to deploy and use such systems as intended by the Act.[16] This is because most businesses, and certainly most non-profit

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[13] 1 Pa. C.S. § 1921(b) ("When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit."); *see, e.g., Implementation of Act 35 of 2007; Net Metering and Interconnection,* Docket No. L-00050174, Final Omitted Rulemaking Order at 10 (entered July 2, 2008) ("We cannot disregard the Legislature's clear direction under the pretext of pursuing its spirit, 1 Pa. C.S. § 1921(b).").

[14] "Utility – A person or entity that provides electric generation, transmission, or distribution services." *2014 NPRM Order*, Annex A at 6 (amending 52 Pa. Code § 75.1).

[15] "To qualify for net metering, the customer-generator must meet the following conditions: . . . The owner or operator of the alternative energy system may not be a utility." *2014 NPRM Order*, Annex A at 7 (amending 52 Pa. Code § 75.13(a)).

[16] Penn State 2014 NPRM Comments at 2-4.

institutions, do not have the financial resources or land to deploy renewable energy projects.[17] In order to develop such projects, prospective customer-generators commonly provide the land, and third-parties install, own and operate the alternative generation facilities.[18] The compensation provided by net metering for energy generated by these facilities in excess of the customer-generator's load is essential for the financial viability of such projects.[19] Such arrangements were clearly prohibited by the rules proposed by the 2014 NPRM Order. By withholding net metering compensation from customer-generators that engage third-party "utilities" to own or operate alternative energy projects on the customer-generators' land, the rules proposed by the 2014 NPRM Order, if adopted, would have rendered such projects uneconomic. The result would have been dramatically fewer alternative energy projects to serve the energy needs of the Commonwealth.[20]

In the 2015 ANFR Order, the Commission agreed that the definition of "utility" proposed in the 2014 NPRM Order was "overly broad such that it could be interpreted as including persons or entities not intended by the Commission, such as landlords or third-party owned and operated systems permitted to net meter under the Commission's policy statement."[21] The Commission therefore has proposed the following revised definition (the most recent revisions are in capital letters):

> *Utility*—A person or entity that provides electric generation, transmission or distribution services, at wholesale or retail, to other

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[17] *See, e.g.,* Comments of Oregon Dairy, Inc. on proposed rules, at 1-2 (filed Aug. 1, 2014); Comments of Crayola LLC on proposed rules, at 2 (filed Aug. 8, 2014)

[18] *See id.*

[19] *See id.*

[20] Penn State 2014 NPRM Comments at 2-10, 14-16.

[21] *2015 ANFR Order*, slip op. at 8.

> persons or entities. AN OWNER OR OPERATOR OF AN ALTERNATIVE ENERGY SYSTEM THAT IS DESIGNED TO PRODUCE NO MORE THAN 200% OF A CUSTOMER-GENERATOR'S ANNUAL ELECTRIC CONSUMPTION SHALL BE EXEMPT FROM THE DEFINITION OF A UTILITY IN THIS CHAPTER.

The 2015 ANFR Order retains the 2014 NPRM Order's proposed disqualification of alternative energy systems owned or operated by utilities from net metering in § 75.13(a)(2).[22] Thus, the intent of the latest proposed revisions appears to be to exempt third-party owner-operators from the definition of "utility" and thus the disqualification of proposed § 75.13(a)(2), provided that the owner-operator's alternative energy system is designed to produce no more than twice the customer-generator's annual consumption.

This change appears to address Penn State's concerns with the 2014 NPRM Order proposals ***if*** the following is true: that, for purposes of the definition, the alternative energy system in question is limited to the alternative energy system used to serve the customer-generator in question. In other words, where the owner-operator of the alternative energy system owns or operates multiple alternative energy systems, for purposes of determining whether a customer-generator that utilizes one of those systems is eligible for net metering, that is the only system considered when applying the 200% consumption threshold, and the owner-operator's other systems are disregarded. Penn State respectfully requests confirmation that this is in fact the intent of the most recent proposed changes to the definition of "utility."

[22] *2015 ANFR Order*, slip op. at 23.

2. § 75.13(a)(3): The limitation of net metering to systems generating no more than 200% of customer-generator electricity requirements violates the Act.

The 2014 NPRM Order proposed a new § 75.13(a)(3), which would have precluded compensation whenever the customer-generator's alternative energy system is capable of generating more than 110% of the customer-generator's annual electric consumption.[23] In its 2014 Comments, Penn State argued that this rule should be rejected because it is in conflict with the plain language of the Act, as amended.[24]

The Act originally defined net-metering as "the difference between the electricity supplied by an electric utility and the electricity generated by a customer-generator when the renewable energy generating system ***is intended primarily*** to offset part or all of the customer-generator's requirements for electricity."[25] In 2007, the Legislature amended this provision by deleting the highlighted language and inserting new language so that net-metering is permitted "when ***any portion*** of the electricity generated by the alternative energy generating system is used to offset part or all of the customer-generator's requirements for electricity."[26] The purpose of the 2007 amendment could not be more clear: Net-metering is ***not*** to be limited to situations where the primary purpose of the renewable energy system is to offset the customer-generator's load. Indeed, the Commission itself recognized this when deleted the "intended primarily to offset" requirement from its Rules in order to conform to the amended statutory definition of net-

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[23] *2014 NPRM Order*, Annex A at 7 (amending 52 Pa. Code § 75.13(a)).

[24] Penn State 2014 Comments at 11-13.

[25] Act 213 of 2004, 2004 Pa. Legis. Serv. Act 2004-213 (S.B. 1030) (Purdon's), § 2.

[26] 73 P.S. § 1648.2 (emphasis added). *See* Act 35 of 2007, 2007 Pa. Legis. Serv. Act 2007-35 (H.B. 1203), § 1 (Purdon's) (amending definition of "net metering").

metering.[27] Penn State's 2014 Comments argued that the effect of the proposed 110% condition would have been to reinstate the "primary purpose" requirement that the Legislature expressly rejected, and that, therefore, it was unlawful.[28]

In response to this and other comments, the 2015 ANFR Order makes several revisions to the proposed rules. First, it proposes increasing the alternative energy size limit from 110 percent to 200 percent. According to the Commission, this "will increase the number of systems that can qualify for net metering, while at the same time meeting the intent of the AEPS Act to exclude generation utilities and merchant generators from obtaining customer-generator status."[29] Second, the revised proposal adds language directing how the customer-generator's annual electric consumption is to be determined for both existing and new service locations:

> Specifically, for existing service locations, the customer can use electric usage data from any 12 consecutive month period

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[27] *Implementation of Act 35 of 2007; Net Metering and Interconnection,* Docket No. L-00050174, Final Omitted Rulemaking Order at 8-9 (entered July 2, 2008).

[28] "Where there is a conflict between the statute and a regulation purporting to implement the provisions of that statute, the regulation must give way." Penn State 2014 Comments at 12-13 (quoting *Heaton v. Commonwealth Department of Public Welfare*, 96 Pa. Cmwlth. 195, 506 A.2d 1350 (1986)).

[29] *2105 ANFR Order*, slip op. at 11. The Commission's inference of an intent to exclude generation utilities and merchant generators from obtaining customer-generator status is based on the use of the term "nonutility" in the Act:

> The intent to exclude generation utilities and merchant generators from net metering is found in the definition of "customer-generator" contained in the AEPS Act. This definition specifically references customers in its title and states that a customer-generator is "a **nonutility** owner or operator of a net metered distributed generation system...." 73 P.S. § 1648.2. There would be no reason to reference net metered systems as "customer"-generators or to further define a customer-generator as a nonutility if the intent was to permit generation utilities and merchant generators to net meter.

Id.

occurring within 60 months prior to submission of the interconnection request. For new service locations, the customer can use an annual electric consumption estimate based on the building type, size and anticipated usage or electric equipment and fixtures planned for the new service location.

Regarding concerns about the impact of this provision on existing customer-generators or those in development, we added language to clearly indicate the Commission's intent that it not be applied to existing customer-generators. In addition, the language provides an avenue for systems currently in development to be excluded from this provision, provided the customer-generator submits an interconnection application within 180 days of the date this provision becomes effective.

Finally, to address the concerns raised by DEP, PDA and the Chesapeake Bay Commission, we propose language excluding from this 200 percent limit those alternative energy systems where the DEP provides confirmation that the alternative energy system is used to comply with the DEP's Chesapeake Watershed Implementation Plan or is an integral element for compliance with the Nutrient Management Act. We recognize that these systems are only sized to handle the waste products that are the subject of the Chesapeake Watershed Implementation Plan and Nutrient Management Act. [30]

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[30] *2015 ANFR Order*, slip op at 12. These revisions are reflected in proposed § 75.13(a)(3):

(3) The alternative energy system must be sized to generate no more than ~~110%~~ 200% of the customer-generator's annual electric consumption at the interconnection meter location when combined with all qualifying virtual meter aggregation locations AS OF THE DATE OF THE INTERCONNECTION APPLICATION.

(I) FOR EXISTING SERVICE LOCATION ACCOUNTS, ANNUAL ELECTRIC CONSUMPTION SHALL BE BASED ON ELECTRIC USAGE DATA FROM ANY 12 CONSECUTIVE MONTH PERIOD OCCURRING WITHIN 60 MONTHS PRIOR TO SUBMISSION OF THE CUSTOMER-GENERATOR'S INTERCONNECTION REQUEST.

(II) FOR NEW SERVICE LOCATION ACCOUNTS, ANNUAL ELECTRIC CONSUMPTION SHALL BE BASED ON THE BUILDING TYPE, SIZE AND ANTICIPATED USAGE OF ELECTRIC EQUIPMENT AND FIXTURES PLANNED FOR THE NEW SERVICE LOCATION.

(III) THE 200% OF THE CUSTOMER-GENERATOR'S ANNUAL ELECTRIC CONSUMPTION LIMITATION APPLIES TO ANY INTERCONNECTION APPLICATION FOR A NEW ALTERNATIVE ENERGY

While the foregoing revisions to proposed § 75.13(a)(3) are steps in the right direction, the new 200% limitation still contravenes the Act. This is because by limiting alternative energy systems eligible for net metering to those that generate no more than 200% of the customer-generator's load, the practical effect of the requirement still will be to disqualify nonutility alternative energy generating systems from net metering even though some portion of the electricity they generate is used to offset part or all of the customer-generator's requirements for electricity.

This limiting requirement is illegal as it is contrary to the 2007 amendments to the Act, which eliminated the "primary purpose" requirement and inserted new language providing that net-metering is permitted "when ***any portion*** of the electricity generated by the alternative energy generating system is used to offset part or all of the customer-generator's requirements for electricity."[31] The 2014 NPRM Order's 110% limitation would have required ***at least*** 91% of

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> SYSTEM OR EXPANSION OF AN EXISTING ALTERNATIVE ENERGY SYSTEM SUBMITTED ON OR AFTER _____. (*Editor's note: The blank refers to 180 days after the effective date of adoption of this proposed rulemaking.*)
>
> (IV) THE 200% OF THE CUSTOMER-GENERATOR'S ANNUAL ELECTRIC CONSUMPTION LIMITATION MAY NOT APPLY TO ALTERNATIVE ENERGY SYSTEMS WHEN THE DEPARTMENT PROVIDES CONFIRMATION TO THE COMMISSION THAT A CUSTOMER-GENERATOR'S ALTERNATIVE ENERGY SYSTEM IS USED TO COMPLY WITH THE DEPARTMENT'S PENNSYLVANIA CHESAPEAKE WATERSHED IMPLEMENTATION PLAN IN COMPLIANCE WITH SECTION 303 OF THE FEDERAL CLEAN WATER ACT AT 33 USC § 1313 OR IS AN INTEGRAL ELEMENT FOR COMPLIANCE WITH THE NUTRIENT MANAGEMENT ACT AT 3 PA. C.S. §§ 501, ET SEQ.

2015 ANFR Order, slip op., Annex A at 23-24.

[31] 73 P.S. § 1648.2 (emphasis added). *See* Act 35 of 2007, 2007 Pa. Legis. Serv. Act 2007-35 (H.B. 1203), § 1 (Purdon's) (amending definition of "net metering") (emphasis added).

the electricity generated to be used to offset the customer-generator's requirements.[32] The 200% limitation, if adopted, will require ***at least*** 50% of the energy generated to be used to offset the customer-generator's requirements.[33] ***Both*** limitations are contrary to the Legislature's express command that net metering be permitted "when ***any portion*** of the electricity generated by the alternative energy generating system is used to offset part or all of the customer-generator's requirements for electricity."[34] While the Commission's desire to limit net metering to non-utilities is understandable, the "any portion" language of § 1648.2 the Act prevents it from doing so on the basis of what percentage of an alternative energy generating system's output is used to offset the customer-generator's electricity requirements.

3. §§ 75.12, 75.13(a)(1) and 75.14: The "behind the meter" and "independent load" conditions added to the rules governing virtual meter aggregation, meters and metering violate the Act.

The proposed revisions to the definition of *Virtual Net Metering* would impose an "independent load" requirement on eligibility of a customer location for net metering.[35] The

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[32] The percentage of electricity generated by the system that used to offset the customer's requirements is the amount used by the customer (here, 100% of customer use) divided by the amount generated (here, 110% of customer use). 100% ÷ 110% = 90.9%.

[33] 100% ÷ 200% = 50%.

[34] 73 P.S. § 1648.2 (emphasis added).

[35] "*Virtual meter aggregation*—The combination of readings and billing for all meters regardless of rate class on properties owned or leased and operated by a customer-generator by means of the EDC's billing process, rather than through physical rewiring of the customer-generator's property for a physical, single point of contact. Virtual meter aggregation on properties owned or leased and operated by **[a]** **the same** customer-generator and located within 2 miles of the boundaries of the customer-generator's property and within a single **[electric distribution company's]** **EDC's** service territory shall be eligible for net metering. **Service locations to be aggregated must be EDC SERVICE LOCATION ACCOUNTS, HELD BY THE SAME INDIVIDUAL OR LEGAL ENTITY, receiving retail electric service from the same EDC and have measureable electric load independent of the alternative energy system. To be independent of the alternative energy system, the electric load must have a purpose other than to**

revisions to § 75.13(a)(1) would impose "behind-the-meter" and "independent load" conditions on a customer-generator's eligibility for net metering. [36] The amendments to § 75.14(e) would similarly require all properties to be aggregated in virtual metering arrangements to "receiv[e] electric generation service and have measureable load independent of any alternative energy system." In its comments on the 2014 NPRM Order, Penn State demonstrated that these measures would severely curtail the deployment of alternative energy systems by customer-generators that, like Penn State, have multiple, varied, noncontiguous tracts of property.

Penn State owns a number of sites with limited potential for economic development. Often the particular attributes of an undeveloped site that limit its potential – location, slope, or other physical features – make it a good candidate for a renewable energy installation. Conversely, the attributes of developed sites – population density, traffic, existing land uses – often limit or preclude the installation or efficient operation of such systems. By definition, an undeveloped site will not have pre-existing load or, after installation, load independent of the load related to operation of the renewable energy system. In order to justify the investment in the renewable system in such situations, the common practice is to install a new service to the generation system, with a meter that reads the generation output, and then to virtually aggregate those readings with the meter readings of the customer-generator's electric service at developed

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support the operation, maintenance or administration of the alternative energy system." *2015 ANFR Order*, slip op., Annex A at 23.

[36] "To qualify for net metering, the customer-generator must meet the following conditions: (1) Have electric load, independent of the alternative energy system, behind the meter and point of interconnection of the alternative energy system. To be independent of the alternative energy system, the electric load must have a purpose other than to support the operation, maintenance or administration of the alternative energy system." *2015 ANFR Order*, slip op., Annex A at 23. (amending 52 Pa. Code § 75.13(a)).

sites with pre-existing load located within two miles and within the same EDC's service area. This is precisely the intent of virtual net metering as provided by the Act.

By requiring all properties participating in virtual net metering to have measureable electric load independent of the alternative energy system behind the meter and point of interconnection of the alternative energy system, the proposed rules would remove the economic incentive the Act gives property owners to install alternative energy systems on their undeveloped sites (i.e., sites without existing load) that are not contiguous with their developed sites (i.e., sites with existing load). The inevitable result will be to discourage the research, deployment and use of renewable energy systems in contravention of the Act's fundamental intent.

In its comments on the 2014 NPRM Order, the IRRC asked the PUC to explain why it believes such limitations do not conflict with the Act.[37] The 2015 ANFR Order does not address that issue. Instead, the ANFR's only response to the problem of non-contiguous properties presented by Penn State is a statement, without further explanation, that "various parties have presented scenarios to the Commission for virtual metering that did not comport with our intent to permit a limited amount of virtual meter aggregation."[38] However, the question is not whether the facts on the ground comport with the ***Commission's*** intent, but whether the Commission's regulations comport with the ***Legislature***'s intent. The proposed regulations do not.

In the 2014 NPRM Order, the Commission asserted that these conditions are "implied" by the definition of "net-metering" in the Act.[39] As stated previously and below, when a statute

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[37] IRRC 2014 Comments at 2.

[38] *2015 ANFR Order*, slip op. at 13.

[39] *2014 NPRM Order* at 11.

is clear and express the Commission may not change such meaning on the basis of implications or vagueness. Indeed, here the Act permits net-metering "when ***any portion*** of the electricity generated by the alternative energy generating system is used to offset ***part or all of the customer-generator's requirements for electricity***."[40] The statute could not be more clear: net-metering is available when "any" portion of the electricity a customer-generator's alternative energy system is used to offset "part or all" of the customer-generator's requirements for electricity. Nothing in the Act suggests, much less requires that the "part" of the customer-generator's load offset by the alternative energy system be either "behind the meter" or "independent" from the system.

As the Commission previously observed when promulgating regulation under the Act,

> this Commission is bound by the requirement to promulgate regulations that do not conflict with the statute the regulations are implementing. See *Popowsky v. Pa. PUC*, 589 Pa. 605, 910 A.2d 38 (2006) and *Commonwealth v. Colonial Nissan, Inc.*, 691 A.2d 1005, 1009 (Pa. Commw. Ct. 2007). The Pennsylvania General Assembly specifically directed that for a customer to be eligible for virtual meter aggregation, the generator must be "located within two miles of the boundaries of the customer-generator's property..." 73 P.S. §1648.2. ***We cannot disregard the Legislature's clear direction under the pretext of pursuing its spirit***, 1 Pa. C.S. § 1921(b).[41] (emphasis added)

By imposing behind-the-meter and "independent load" requirements on net-metering, the proposed rules contravene the Legislature's "clear direction" that customer-generators "shall" be compensated by net-metering when any part of their electrical requirements is offset by their alternative energy systems.

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[40] 73 P.S. § 1648.2 (emphasis added).

[41] *Implementation of Act 35 of 2007; Net Metering and Interconnection,* Docket No. L-00050174, Final Omitted Rulemaking Order at 10 (entered July 2, 2008).

The 2007 amendments to the Act's definition of net-metering codified the requirements for virtual meter aggregation:

> "Net metering." The means of measuring the difference between the electricity supplied by an electric utility and the electricity generated by a customer-generator when any portion of the electricity generated by the alternative energy generating system is used to offset part or all of the customer-generator's requirements for electricity. ***Virtual meter aggregation on properties owned or leased and operated by a customer-generator and located within two miles of the boundaries of the customer-generator's property and within a single electric distribution company's service territory shall be eligible for net metering.***[42]

There is ***no*** requirement that each of the properties involved in virtual meter aggregation receive electric generation service, nor is there any requirement that each property have measurable load independent of any alternative energy system. To the contrary, the ***only*** requirements for virtual meter aggregation to be eligible for net metering are that the properties involved be (1) owned or leased and operated by a customer-generator, (2) located within two miles of the customer-generator's property, and (3) located within a single EDC's service territory. As discussed above, the proposed limitations on virtual meter aggregation will discourage the deployment and use of alternative energy systems by customer-generators that, like Penn State, have multiple, varied, noncontiguous tracts of property. The proposed rules, if adopted, would thus frustrate the fundamental intent of the Act as well as violate its terms.

4. § 75.14(3): The two-mile limitation on virtual meter aggregation is unnecessary and frustrates the purposes of the Act.

Section 75.14(3) of the proposed rules limits virtual meter aggregation to properties located within two miles of the customer-generator's property:

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[42] Act 35 of 2007, 2007 Pa. Legis. Serv. Act 2007-35 (H.B. 1203) (Purdon's), § 1.

> Virtual meter aggregation shall be limited to meters located on properties owned or leased and operated by the same customer-generator within 2 miles of the boundaries of the customer-generator's property and within a single EDC's service territory.

This limitation is not required by the Act and, if retained, it will thwart the research, development and deployment of alternative energy systems as intended by the Legislature.

The two-mile criterion in the proposed rule appears to have its roots in the Act's definition of "Net metering," which provides as follows:

> "Net metering." The means of measuring the difference between the electricity supplied by an electric utility and the electricity generated by a customer-generator when any portion of the electricity generated by the alternative energy generating system is used to offset part or all of the customer-generator's requirements for electricity. ***Virtual meter aggregation on properties*** owned or leased and operated by a customer-generator and ***located within two miles of the boundaries of the customer-generator's property*** and within a single electric distribution company's service territory ***shall be eligible for net metering***.[43]

However, while the statute provides that properties within two miles of the boundaries of the customer-generator's property "***shall be*** eligible for net metering," it says nothing about more distant properties. In other words, the two mile measure is a floor, not a ceiling, for virtual net metering eligibility. By imposing the two-mile criterion as a ***limitation*** on eligibility for virtual net metering, the Commission's proposed rule thus reduces the incentive (and ultimately the ability) of large customer-generators with properties scattered over a large areas – like Penn State – to deploy alternative energy generation systems.

By providing that properties within two miles of the customer-generator's property "shall be" eligible for net metering and remaining silent as to more-distant properties, the Act permits, but does not require, the virtual net metering of properties located more than two miles from the

[43] 73 P.S. § 1648.2 (emphasis added).

boundaries of the customer-generator's property. Penn State respectfully submits that the other requirement implemented by the Commission – that the properties be located within the service area of the same EDC – renders the two-mile limitation unnecessary. That is, if the properties sought to be virtually aggregated for net metering are situated in the same EDC service area, there is no reason to disqualify them because they are located more than two miles from the boundaries of the customer-generator's property. The imposition of the two-mile limitation in such circumstances only reduces the incentive and ability of customer-generators to deploy alternative generation systems, in derogation of the purposes of the Act, without any corresponding benefit.

5. § 75.17: The proposed procedure for obtaining commission approval of customer-generator status unduly burdens prospective customer-generators and thus thwarts the goals of the Act.

The proposed rules would create a completely new set of regulatory burdens on prospective customer generators with larger energy systems (500 kW or greater) by requiring them to seek and approve Commission approval of their customer-generator status.[44] The 2014 NPRM Order failed to identify any compelling need for this additional layer of bureaucracy. To the contrary of the ANFR's proposal, the Commission observed in its proposed rulemaking that the current system "has worked well for EDCs and customer-generators."[45]

In the 2015 ANFR Order, the Commission notes the concerns of some commentators regarding the delays that would be created by the new procedures and tweaks the rules accordingly. However, the Commission did not address as required by the rulemaking process

[44] *See 2014 NPRM Order*, Annex A at 11-12 (adding 52 Pa. Code § 75.17).

[45] *2014 NPRM Order* at 21.

the administrative burdens that these procedures will impose on research, development and deployment of alternative energy systems, and continues to propose this new requirement.

In the 2014 NPRM Order, the Commission generalized about the burdens imposed by this additional requirement by stating the its subjective belief that customer-generators that deploy larger systems have the resources to jump through such regulatory hoops and that "the total number of such systems applying for net metering in a year will remain relatively small such that it will not burden the EDCs or the Commission." However, the fact is that every additional burden discourages the research, deployment and use of renewable energy systems, and the above subjective statement is no substitute for an objective analysis required in the rulemaking process as to the impact, delay and cost of this new process.

The Commission's expectation that the total number of such systems applying for net metering will "remain relatively small" represents a policy divergence between the proposed rules and the Act. The purpose of the Act is not to keep the number of systems eligible for compensation "relatively small," but rather to promote these alternative generation systems and to provide customer generators with "annual compensation for excess generation in a manner that encourages research, development and deployment of alternative energy systems." If the proposed rules are adopted, the Commission's expectation with respect to lack of growth of large systems applying for net metering may be fulfilled, but the fundamental intent of the Act will not.

6. The proposed rules are not in the public interest.

The Pennsylvania Regulatory Review Act[46] lists the criteria for determining whether a proposed rule is in the public interest.[47] The "first and foremost" criterion is "whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based."[48]

The 2014 NPRM Order repeatedly states that the intent of the proposed rules is to "clarify,"[49] to provide "clarity,"[50] and to provide "guidance."[51] This intent is echoed in the 2015 ANFR Order. However, to the extent the proposed rules restrict the availability of compensation to customer-generators contrary to fundamental intent of the Act and violate or illegally amend

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[46] Act of June 25, 1982, P.L. 633, No. 181 (reenacted and amended June 30, 1989, P.L.73, No.19), as amended, codified at 71 P.S. § 745.1 *et seq.* ("Regulatory Review Act").

[47] The Regulatory Review Act was enacted pursuant to the General Assembly's finding that its delegation of rulemaking authority to various agencies had "resulted in regulations being promulgated without undergoing effective review concerning cost benefits [sic], duplication, inflationary impact and conformity to legislative intent." 71 P.S. § 745.2(a). The General Assembly therefore concluded that "it must establish a procedure for oversight and review of regulations adopted pursuant to this delegation of legislative power in order to curtail excessive regulation and to require the executive branch to justify its exercise of the authority to regulate before imposing hidden costs upon the economy of Pennsylvania." *Id.* That procedure is set forth in the Regulatory Review Act. An agency proposing a regulation must submit the regulation for review by the Independent Regulatory Review Commission ("IRRC") together with a regulatory analysis form providing specified information. *Id.* § 745.5(a). The IRRC then may within 30 days of the close of the public comment period communicate to the agency its comments, recommendations and objections to the proposed regulation based on whether the regulation meets or fails to meet certain criteria for determining whether the regulation is in the public interest. *Id.* § 745.5(g).

[48] 71 P.S. § 745.5b(a).

[49] *See 2014 NPRM Order* at 1, 16, 17, 19, 25.

[50] *See id.* at 5, 6, 9, 10, 14, 15, 16, 17, 24, 27.

[51] *See id.* at 5, 6, 9, 10, 14.

its express directives regarding net-metering eligibility,[52] the ANFR Order goes far beyond clarifying or guidance. It is respectfully submitted the Commission cannot illegally amend or countermand what the Legislature intended and expressly stated by means of amendments to net-metering regulations.

Given the above, the proposed rules fail to meet the "first and foremost" requirement for regulations promulgated by a Pennsylvania agency—conformity with the letter of the statute in question and the intent of the General Assembly.[53]

The proposed rules that are the subject of these comments also fail to meet the additional public interest criteria of the Regulatory Review Act. They are not based upon any demonstrated need,[54] nor are they based upon or supported by acceptable data.[55] To the contrary, they represent substantial legislative-like decisions by the Commission that differ markedly from the General Assembly, and thus require at a minimum IRRC's and the Legislature's review before they are implemented,[56] and more likely require an amendment to the Act itself.

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[52] See section II.A, above.

[53] *See* 71 P.S. § 745.5b(a).

[54] *See id.* § 745.5b(b)(3)(iii) (reasonableness of regulation to be determined by considering need for regulation).

[55] *See id.* § 745.5b(b)(3)(v) (reasonableness of regulation to be determined by considering whether acceptable data is basis for regulation); *id.* § 745.5b(b)(7) (whether regulation is in the public interest to be determined by considering whether regulation is supported by acceptable data).

[56] *See id.* § 745.5b(b)(4) (whether a regulation is in the public interest is to be determined by considering "whether the regulation represents a policy decision of such a substantial nature that it requires legislative review").

B. Alternatively, the Commission Should Exempt Public, Educational, Agricultural and Non-Profit Customer-Generators from the New Restrictions and Requirements Imposed by the Proposed Rules

It appears that the proposed rules stem from a concern that customer generators may deploy excessive alternative energy systems or partner with so-called "merchant generators" to do so in order to generate compensation under the Act. This concern should not extend to existing and prospective public, educational, agricultural and non-profit customer-generators. Such institutions are not required to generate returns for private shareholders, and their alternative energy projects are sized and structured to ensure financial viability, meet future energy needs, and in some cases contribute to research in the field of alternative energy – not to generate profit. Therefore, if the Commission moves forward with the proposed rules discussed in these Comments,[57] it should exempt public, educational, agricultural and non-profit institutions from their application.

[57] *I.e.*, proposed **§§ 75.1** (expanded definition of "utility"), **75.12**, **75.13(a)(1)**, **75.13(a)(2)**, **75.13(a)(3)**, **75.14(e)**, **75.17**.

III. CONCLUSION

For all of the foregoing reasons, Penn State urges the Commission to reject the proposed rules as discussed above.

Respectfully submitted,

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Dated: May 29, 2015